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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

14 LUNELL GAMBLE, and SHEILA
15 KENNEDY, on behalf of themselves as
well as a class of similarly situated
individuals.

10 Plaintiff

VS.

18 KAISER FOUNDATION HEALTH
19 PLAN, INC; KAISER FOUNDATION
20 HOSPITALS, INC.; and THE
21 PERMANENTE MEDICAL GROUP;
all doing business as KAISER
PERMANENTE MEDICAL CARE
PROGRAM

Defendants

Case No. 4:17-cv-06621-YGR

**ADMINISTRATIVE MOTION FOR
LEAVE TO FILE UNDER SEAL A
DECLARATION IN SUPPORT OF
RESPONSE TO ORDER TO SHOW
CAUSE**

24 Pursuant to Local Rules 7-11 and 79-5, plaintiffs seek leave to file under seal a
25 declaration of plaintiff Gamble in support of responding attorney's response to the Order to
26 Show Cause issued on August 30, 2019 (ECF 140). In the declaration – as in plaintiffs'
27 Rule 16 motion – Ms. Gamble refers to matters that took place during a mediation that
28 occurred before this case was removed to federal court.

1 As noted in the Rule 16 motion, plaintiffs were concerned about possible application
2 of the California mediation privilege. *See* Evid. Code §1119. Although plaintiffs refrained
3 from including post-mediation communications along with the Rule 16 motion out of a
4 concern over application of the California privilege, plaintiffs were granted leave to file
5 under seal a post-mediation exchange of correspondence along with the reply.

6 In opposition to the Rule 16 motion, Kaiser cited to *Sony Comput. Entm't Am., LLC v.*
7 *HannStar Display Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.)*, 835 F.3d 1155,
8 1158-59 (9th Cir. 2016), where the Ninth Circuit held the California mediation privilege
9 does not apply to the mediation of mixed federal and state law claims. In this case, because
10 the Superior Court had granted leave to add a federal claim under §1981, and because
11 plaintiffs understood the parties to attempt to settle and release Kaiser on federal and state
12 law claims, under *Sony* the California privilege seemingly does not apply. Courts in this
13 jurisdiction do not recognize a federal “settlement privilege” beyond the reach of Rule 408
14 of the Federal Rules of Evidence. *See Big Baboon Corp. v. Dell, Inc.*, 2010 U.S. Dist.
15 LEXIS 108027, at *14-16 (C.D. Cal. 2010) (“courts in the Ninth Circuit have been reluctant
16 to adopt” a settlement privilege); *Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A.*, 254
17 F.R.D. 568, 582-585 (N.D. Cal. 2008) (party failed “to put forth a persuasive case for a
18 settlement privilege”); *Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, 2007 U.S. Dist.
19 LEXIS 27437, at *12-20 (N.D. Cal. 2007) (“any federal settlement privilege is contrary to
20 the enactment approved by the legislature”).

21 Under Rule 408, settlement communications may not be admitted “either to prove or
22 disprove the validity or amount of a disputed claim” but may be admitted “for another
23 purpose.” Here, plaintiffs seek to introduce the declaration of Ms. Gamble *not* to prove the
24 validity or amount of a disputed claim, but to address issues of conflict and violation of
25 Rules of Professional Conduct in connection with the Court’s Order to Show Cause.

26 Because the declaration involves matters during the confidential mediation, and in
27 light of the Court’s order sealing the post-mediation correspondence, the Court should find
28 that the declaration is confidential, and not for public disclosure. The declaration is

1 pertinent to a non-dispositive motion, and are therefore subject to sealing by the district
2 court on a showing of “good cause.” *See Traylor Bros. v. San Diego Unified Port Dist.*,
3 2009 U.S. Dist. Lexis 53827 *5 (S.D. Cal. 2009) (“To warrant sealing documents attached
4 to a non-dispositive motion, the party seeking protection must show good cause under Rule
5 26(c)”). Here, as stated in the publicly filed supplemental declaration of counsel, good cause
6 is shown to keep the declaration sealed along with the Rule 16 reply exhibits.

CONCLUSION

8 For the foregoing reasons, plaintiffs request the Court grant leave to file under seal the
9 Declaration of Lunell Gamble and an exhibit filed in support of responding counsel's
10 response to the August 30, 2019, Order to Show Cause.

Respectfully submitted,

12 || Dated: September 16, 2019 LAW OFFICE OF JEREMY L. FRIEDMAN

By: /s/Jeremy L. Friedman
Jeremy L. Friedman
Attorney for plaintiffs and putative class

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk of the Court for the
Northern District of California, by using the CM/ECF system. I certify that all participants
in the case are registered CM/ECF users and that service will be accomplished by the
CM/ECF system.

/s/ Jeremy L. Friedman
Jeremy L. Friedman